In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 682

WALLER C. BOEDEKER, PETITIONER

v.

HAROLD C. ABRAMSON, TRUSTEE, FOR CASCO CHEMICAL CORPORATION, BANKRUPT, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The first question involved is whether the trustee in bankruptcy, by stepping into the shoes of one or more of three actual existing creditors of the bankrupt, is entitled under Sections 60, 67, and 70 of the Bankruptcy Act, as amended (11 U.S.C. 96, 107 and 110), to set aside as preferential a distribution of funds to petitioner on October 5, 1961. Such a distribution cannot be vacated if it occurred more than four months before the filing of the petition that initiated this bankruptcy proceeding. Thus, the answer turns on whether the date of bankruptcy is the date of the original involuntary petition, filed on October 4,

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1961, or the date of an amended petition filed on February 26, 1962, more than four months after the payments to petitioner.

Creditors of Casco Chemical Corporation alleged in the October 4 petition three acts of bankruptcy, using the general terms of the statute. Casco opposed the petition. The next day, October 5, the district court, in a different proceeding, entered judgment ordering payment to petitioner as assignee of certain of Casco's unpaid accounts receivable. On February 26, 1962, an amended petition was filed, alleging as an act of bankruptcy the judgment of October 5, 1961, and the resulting payments to petitioner and others. Casco then withdrew its opposition to bankruptcy, and an adjudication by agreement and default ensued. (Pet. A–3—A–4.)

Contrary to the petitioner's contention (Pet. 9–12) the court of appeals did not hold that allegations concerning the October 5 judgment related back to the October 4 petition; the court expressly said of that theory, "the answer cannot be found there" (Pet. A–4).[1] Instead, the court held (Pet. A–5—A–8) that any pleading defect in a petition that merely recites the wording of the statute is not jurisdictional, and that only the debtor may object to such an involuntary petition. Section 18 (11 U.S.C. 41). Thus, whatever might have been the proper result had Casco persisted in resisting bankruptcy, the statute compelled the court of appeals' holding that Casco's acquiescence neces-

[1] This ruling is in accord with those cases alleged to be in conflict (Pet. 9–11), which refuse to apply a relation back theory. Nor is this case like those where there was "a complete absence of an allegation of any act of bankruptcy." (Pet. A–10—A–11.)

sarily fixed the date of bankruptcy as of October 4, the date of filing of the original petition.

This decision is in accord with the decisions of the First, Second, Third, Seventh and Eighth Circuits. See *Harney Shoes, Inc.* v. *National Fabrics & Finishing Co.*, 44 F. 2d 517 (C.A. 1); *South Suburban Safeway Lines, Inc.* v. *Carcards, Inc.*, 256 F. 2d 934 (C.A. 2); *Minkoff* v. *Steven Jrs.*, 260 F. 2d 588 (C.A. 2); *Kay* v. *Federal Rubber Co.*, 46 F. 2d 64, 65 (C.A. 3); *Bixby* v. *First National Bank of Elwood*, 250 F. 2d 713 (C.A. 7); *Commercial Credit Corp.* v. *Skutt*, 341 F. 2d 177 (C.A. 8). See 2 Collier on Bankruptcy (14th ed., 1966), Secs. 18.23, 18.26, pp. 72–73.

2. As an alternative ground for decision, the court of appeals held that the trustee was entitled to set aside the payment to petitioner under Section 70e of the Bankruptcy Act on the ground that the tax liens of the United States, as well as those of two other secured creditors of the bankrupt, were superior to petitioner's claims. Under this theory, the date of bankruptcy is not controlling, because Section 70e does not prescribe any time limits within which the trustee may avoid transactions, if the secured creditors may void them under State or federal law. See *Roscoe Moss Co.* v. *Duncan*, 336 F. 2d 670 (C.A. 9); 4 Collier on Bankruptcy (14th ed., 1964), Secs. 70.69, 70.71, p. 1547.

Petitioner's claims are as the assignee of a bank to which Casco had assigned sight drafts, secured by various of its accounts receivable. The bank failed to record the assignments. Subsequently, the United States and two other creditors recorded their claims. (Pet. A–11—A–12, A–14, A–15.) The court of appeals held

that the drafts were not negotiable instruments, and that, therefore, under Texas law, 1A, 16B Vernon's Texas Civil Statutes Annotated, Articles 260–1, 5940, the bank's failure to record the assignment made it voidable as to the government's recorded tax lien and the attachment lien of another creditor. (Pet. A–11—A–18.)

This decision is a correct reading of applicable Texas law.[2] Moreover, Article 260–1 was repealed effective June 30, 1966, and replaced by the different requirements of the Uniform Commercial Code.[3] Therefore, the issue does not have the future importance that would justify review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] See *Parker Square State Bank* v. *Triangle Supply Co.*, 364 S.W. 2d 418 (Tex. Civ. App.), petition for writ of error to Texas Supreme Court denied June 5, 1963; *South Main State Bank* v. *State*, 365 S.W. 2d 946 (Tex. Civ. App.), petition for writ of error to Texas Supreme Court refused July 31, 1963; *Lawrence* v. *Delta Metals, Inc.*, 280 F. 2d 86 (C.A. 5).

[3] See § 9.302 of the Uniform Commercial Code (2 Texas General and Special Laws (1965) c. 721).

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